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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LINPING WANG et al., Plaintiffs and Appellants, v. SUN HOSPITALITY, INC., Defendant and Respondent.	B300241 (Los Angeles County Super. Ct. No. BC680195)

APPEAL from an order of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Affirmed.

Robins Cloud, Bill Robins III, Ari Friedman, for Plaintiffs and Appellants.

Procter, Shyer & Winter, James N. Procter II, Megan C. Winter, for Defendant and Respondent.

Plaintiffs and appellants Linping Wang and Zhanping Zhang appeal from a portion of a judgment following an order granting judgment notwithstanding the verdict in favor of defendant and respondent hotel operator Sun Hospitality, Inc., on their claims for negligent infliction of emotional distress. On appeal, Wang and Zhang contend there was substantial evidence to support the jury's finding that they were contemporaneously aware of the injury-producing event when their son Kevin Wang fell through an open hotel room window.[1] We conclude there was no substantial evidence that the parents were aware of the injury-producing event at the time it occurred, and therefore, the trial court properly granted the motion for judgment notwithstanding the verdict. We affirm.

FACTS

On February 9, 2017, Wang, Zhang, and their sons, 12-year-old Yuan Yi Wang (Michael) and 4-year-old Kevin, checked in to the Microtel Inn & Suites by Wyndham that Sun operated in Tracy, California. The family changed to a second floor room at the hotel the following morning. The interior design of each hotel room featured a cushioned window seat bench in front of a window, which was built over the heating and air conditioning unit. When the family

[1] Because more than one participant in the case shares the last name Wang, the children will be referred to by their first names for ease of reference.

placed their luggage in the hotel room, there was a strong smell from the cleaning products that had been used in the room and a cleaning cart was in the hall outside the door. The room had two beds and the window, which had a screen, was open. Wang spent the day touring his business associate's warehouse, while Zhang and the children visited with the associate's family members at their home.

Zhang and the boys returned to the hotel room in the afternoon. Zhang told Michael to do his homework and told Kevin not to bother his brother, before lying down to rest on the bed furthest from the window. When Wang returned to the room around 4:30 p.m., the boys were huddled together on the bed closest to the window watching animation on an electronic tablet device. Zhang was sleeping on the bed furthest from the window. Wang sat on the couch looking at his cell phone for 15 to 20 minutes. Wang told his older son to study and went to the restroom. He did not shut the door to the restroom, but he could not see into the room and could not see the boys at all. Michael moved to the desk in the room and started his homework. He was doing his homework, not watching Kevin.

Maintenance worker Ramon Flores finished his work for the day and was pushing a cart of tools on his way out of the hotel lobby when he saw something fall and hit the ground.

Michael realized that he did not hear Kevin's voice. He looked around for Kevin and saw the screen on the window was broken, so he walked over and looked out the window.

He saw Kevin on the ground near a car. Michael screamed very loud. He said, "Daddy, Kevin fell down."

Wang had been in the restroom for 15 to 30 minutes. He did not know Kevin had fallen until he heard Michael yell. Wang rushed out of the restroom. Michael's yelling also woke up Zhang. She did not see or hear Kevin fall. She ran over to the window to look, and saw Kevin on the ground face down. He was not moving or making any noise. Wang ran downstairs with his wife and Michael.

Flores came outside the hotel, walked closer and saw it was a child, who was not moving or making any sound. He went back inside to the front desk to tell them to call emergency services because a baby had fallen down. A few seconds after he began speaking to the woman at the front desk, he noticed Zhang run past on her way outside.

When Wang, Zhang and Michael got downstairs, they saw Kevin lying on the ground in front of a car. He was crying, his head was bleeding and his eyes were swollen. Zhang reached Kevin right after Wang and began crying herself; she could not breathe. Wang felt helpless as his son was screaming. An ambulance came and took Kevin to the hospital. He suffered serious injuries from the fall.

PROCEDURAL BACKGROUND

On October 18, 2017, Wang brought a negligence action as guardian ad litem for Kevin. On October 9, 2018, Zhang and Wang, on behalf of themselves and as guardian ad litem

for Kevin, filed the operative second amended complaint against Sun and an architectural products firm. On Kevin's behalf, the complaint alleged negligence and premises liability against Sun, and strict products liability against the architectural products firm that manufactured the window. The complaint alleged negligent infliction of emotional distress on behalf of all plaintiffs against all defendants. The plaintiffs dismissed the architectural products firm prior to trial.

A jury trial began on January 16, 2019. Sun moved for partial nonsuit on the ground that there was insufficient evidence as a matter of law to support finding negligent infliction of emotional distress as to the bystanders. The trial court denied the motion in an abundance of caution.

The jury found Sun was negligent, and Sun's negligence was a substantial factor in causing harm to Kevin. Kevin's damages for past medical expenses were $252,019.39. His past non-economic loss was $500,000. The jury found Wang and Zhang were also negligent, but franchisor Microtel Inn & Suites by Wyndham and the City of Tracy were not negligent. The jury apportioned 80 percent of the liability to Sun and 10 percent to each of the parents. The jury found both parents were present when the fall occurred and were "then aware that the fall was causing injury" to Kevin. Both parents suffered serious emotional distress. The jury awarded $50,000 to each parent, for a total of $100,000 in damages for past non-economic loss.

On March 4, 2019, the trial court entered judgment based on the jury verdict. Sun filed a motion for partial judgment notwithstanding the verdict on the ground that the evidence was insufficient to support finding negligent infliction of emotional distress as to the parents. Wang and Zhang opposed the motion. A hearing was held and the court took the motion under submission. The trial court granted the motion on May 28, 2019, based on the undisputed evidence that Wang, Zhang, and Michael did not see Kevin fall through the window or land on the ground causing his injuries. The court entered an amended judgment on June 13, 2019. Wang and Zhang filed a timely notice of appeal.

DISCUSSION

Standard of Review

"The trial court's power to grant a motion for judgment notwithstanding the verdict is the same as its power to grant a directed verdict. (Code Civ. Proc., § 629.) 'A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support.' [Citations.]" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.) "For evidence to be substantial, it must be of ponderable legal significance, reasonable, credible, and of

solid value. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) The 'focus is on the quality, not the quantity, of the evidence.' (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871.) We resolve all evidentiary conflicts and indulge all reasonable inferences in support of the judgment. (*Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291, 308.)" (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 396.)

Negligent Infliction of Emotional Distress

Wang and Zhang contend that there was substantial evidence to support the jury's finding of negligent infliction of emotional distress for both their claims. We disagree.

"'[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, *but only if,* said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.' (*Thing*[*v. La Chusa* (1989) 48 Cal.3d 644,] 667–668, fns. omitted, italics added [(*Thing*)].)" (*Bird v. Saenz* (2002) 28 Cal.4th 910, 915 (*Bird*).)

In *Bird*, the Supreme Court discussed its prior ruling in *Thing*, explaining its conclusion that the plaintiff could

not maintain a claim for negligent infliction of emotional distress: "The plaintiff mother had been nearby when the defendant's automobile struck and injured her minor child, but the plaintiff had not seen or heard the accident; instead, she became aware of it only when someone told her it had occurred and she rushed to the scene and saw her child lying injured and unconscious on the road. Under these facts, the plaintiff could not satisfy the requirement of having been present at the scene of the injury-producing event at the time it occurred and of having then been aware that it was causing injury to the victim. We reinforced our conclusion by disapproving the suggestion in prior cases that a negligent actor is liable to all those persons 'who may have suffered emotional distress on viewing or learning about the injurious *consequences* of his conduct' rather than on viewing the injury-producing *event*, itself. ([*Thing*, *supra*, 48 Cal.3d] at p. 668, italics added, disapproving *Nazaroff v. Superior Court* (1978) 80 Cal.App.3d 553, and *Archibald v. Braverman* (1969) 275 Cal.App.2d 253, to the extent inconsistent with *Thing*.)" (*Bird*, *supra*, 28 Cal.4th at pp. 915–916, fn. omitted.)

The Supreme Court also summarized the facts of the disapproved cases, stating: "In both *Nazaroff v. Superior Court*, *supra*, 80 Cal.App.3d 553, and *Archibald v. Braverman*, *supra*, 275 Cal.App.2d 253, courts had permitted NIED claims by plaintiffs who had seen the immediate aftereffects of injury-producing events, but not the events themselves. The plaintiff in *Nazaroff*, upon

hearing a neighbor scream her child's name, realized he must have fallen into a pool and immediately ran 'perhaps thirty feet' to see the child being pulled from the water and given mouth-to-mouth resuscitation. (80 Cal.App.3d at p. 559.) Similarly, the plaintiff in *Archibald* had 'viewed [her] child's injuries within moments' after gunpowder exploded in his hand. (275 Cal.App.2d at p. 255.)" (*Bird*, *supra*, 28 Cal.4th at p. 916, fn. 2.)

In *Bird*, plaintiffs who observed medical staff rolling their mother through the hall could not show they were present at the scene of the injury-producing event when it occurred and were then aware it was causing injury, because they were not aware her artery had been transected during surgery at the time it occurred, and they were not contemporaneously aware of any error in diagnosis and treatment of the injury when they saw her in the hall. (*Bird*, *supra*, 28 Cal.4th at pp. 921–922.)

In *Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 144–145 (*Ra*), the appellate court found no evidence to support a claim of negligent infliction of emotional distress, because the plaintiff Ra was not a percipient witness to, and did not have contemporaneous awareness of, the injury to her husband. Ra was shopping in the women's section of a retail store approximately 10 to 15 feet from where her husband was looking at a men's sweater display. (*Id.* at p. 145.) Ra had her back to her husband when she heard a loud crash that caused her to fear for both of their safety, and she believed it was more likely than not that he had

been injured. (*Id*. at pp. 144–145.) An overhead sign had fallen, hitting him in the head. After hearing the crash, Ra turned and saw her husband holding his head, bent at the knees and in pain. (*Ibid.*) She did not notice the sign on the ground.

The *Ra* court found that the plaintiff had not contemporaneously perceived the injury inflicted on her husband and did not know with reasonable certainty that her husband had been hurt until she turned and saw him immediately afterward. (*Ra*, *supra*, 154 Cal.App.4th at pp. 144–145.) "[A]lthough aware by virtue of the loud bang that some traumatic event had occurred, [Ra] did not clearly and distinctly perceive the injurious impact of the overhead sign falling until she looked in her husband's direction after the sign was already on the ground." (*Id*. at p. 151.) "In sum, Ra's fear for her husband's safety at the time she heard the loud bang emanating from the part of the store where she knew he was shopping and her belief the possibility of his injury was more likely than not are insufficient as a matter of law to establish contemporaneous awareness of her husband's injuries at the time of the injury-producing accident within the meaning of *Thing*, *supra*, 48 Cal.3d at pages 667 to 668 and *Bird v. Saenz*, *supra,* 28 Cal.4th at pages 915 to 916." (*Id*. at pp. 152–153.)

In the present case, neither parent had a contemporaneous awareness of Kevin's injuries at the time of the injury-producing accident. Wang was in the restroom, where he could not see either of the boys and could not see

into the bedroom. Zhang was asleep. Neither of them saw Kevin at the window, saw the window screen give way, or saw Kevin falling from the window. Michael did not see Kevin at the window or hear him falling through the screen. Michael did not see Kevin until after he had already struck the ground. Michael alerted his parents, who witnessed Kevin on the ground, after he had already suffered injuries from his fall. The testimony of the maintenance worker Flores simply confirms that the parents did not arrive downstairs until after Kevin had struck the ground. There was no evidence that could support the jury's finding that either parent was aware of Kevin's injury at the time it was occurring. They suffered emotional distress upon viewing the injurious consequences of the event, rather than the event itself. The trial court properly granted the motion for judgment notwithstanding the verdict.

DISPOSITION

The judgment is affirmed. Respondent Sun Hospitality, Inc., is awarded its costs on appeal.

MOOR, J.

We concur:

RUBIN, P. J.

BAKER, J.